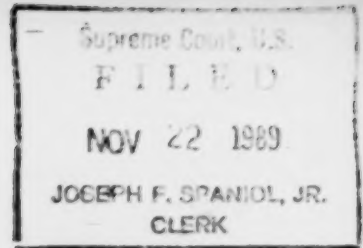


No. 89-424



IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MISSOURI,
Petitioner,

vs.

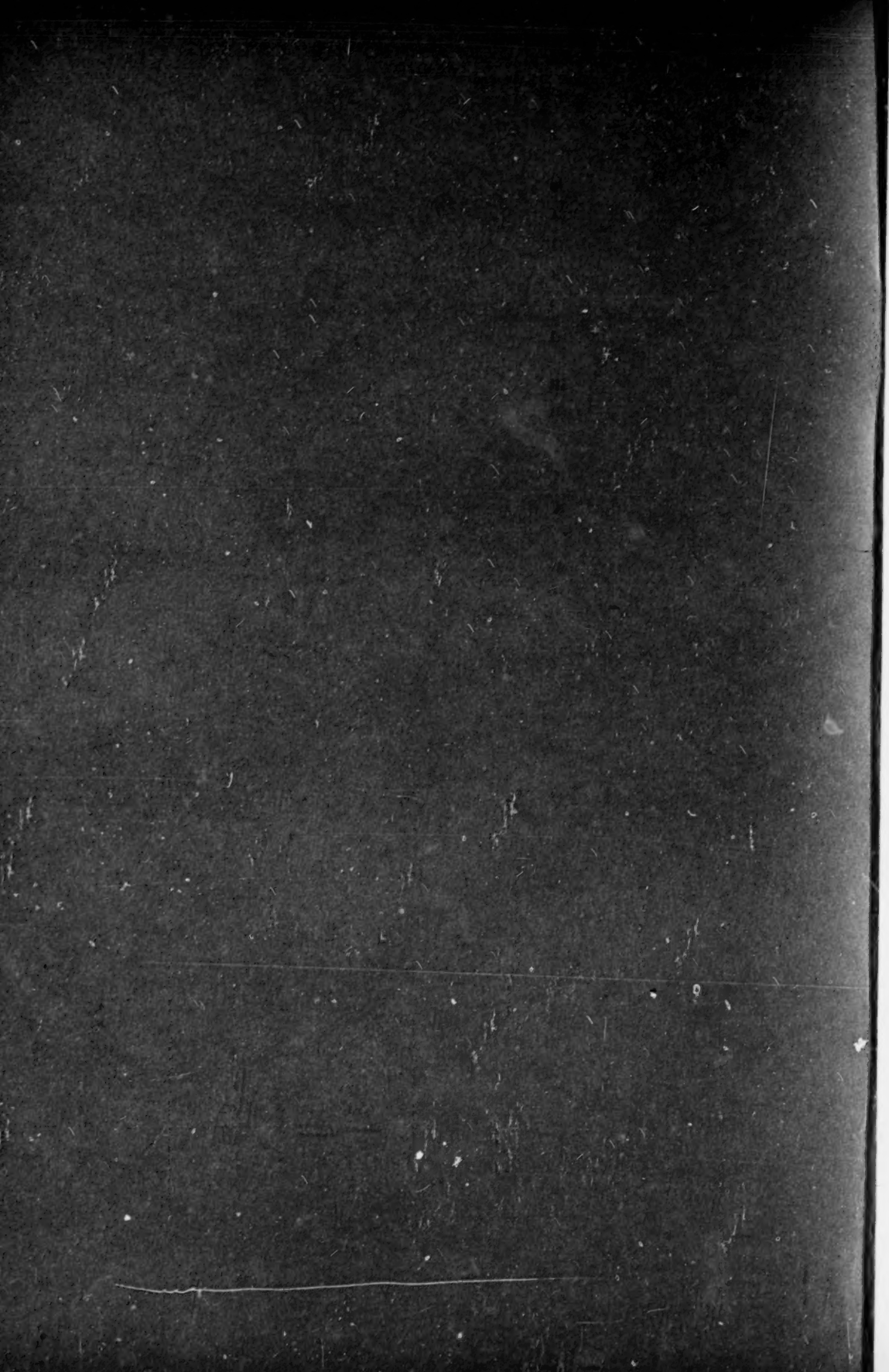
DENNIS N. BULLOCH,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

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QUESTIONS PRESENTED

- I. Whether the Supreme Court of Missouri erred in its application of the double jeopardy clause of the Fifth Amendment by prohibiting the State from trying a charge of Armed Criminal Action after a trial of the underlying offense when State statutes prohibit joint trial of the offenses?
- II. Whether the double jeopardy clause of the Fifth Amendment, which allows authorized cumulative punishment for two offenses which are the "same" offense under *Blockburger v. United States*, extends to successive prosecution for those offenses, when state law prohibits the State from trying any offense(s) with a first degree murder offense in a single trial when the State seeks the death penalty?



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OPINIONS BELOW

The opinions of the Missouri Supreme Court (Pet.App. A and B) are reported at 771 S.W.2d 71 (Mo.banc 1989). The opinion of the Missouri Court of Appeals, Eastern District (Pet.App. F) is unpublished, number 54859, August 9, 1989.

JURISDICTION

The opinion of the Missouri Supreme Court was filed on May 16, 1989. A petition for rehearing was denied on June 13, 1989. (Pet.App. D). The Petition for writ of certiorari was filed on September 9, 1989. The jurisdiction of this court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

Section 565.004 R.S.Mo. (1986) Joinder of offenses, exception-prior offenders, procedure, exception, first degree murder-joinder, first degree murder, waiver of death penalty.

1. Each homicide offense is lawfully joined in the same indictment or information together with any homicide offense or other than a homicide shall be charged together with such offense in separate counts. A count charging any offense of homicide may only be charged and tried together with one or more counts of any other homicide or offense other than a homicide when all such offenses arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3 and 4 of this section, no murder in the first degree offense may be tried together with any offense other than murder in the first degree. In the event of a joinder of homicide offenses, all offenses charged which are supported by the evidence in the case, together with all proper lesser offenses under Section 565.025, shall, when requested by one of the parties or the court, be submitted to the jury or, in a jury-waived trial, considered by the judge.

2. A count charging any offense of homicide of a particular individual may be joined in an indictment or information and tried with one or more counts charging alternatively any other homicide or offense other than a homicide committed against that individual. The State shall not be required to make an election as to the alternative count on which it will proceed. This subsection in no way limits the right to try in the conjunctive, where they are properly joined under subsection 1 of this section, either separate offenses other than murder in the first degree or separate offenses of murder in the first degree committed against different individuals.

3. When a defendant has been charged and proven before trial to be a prior offender pursuant to Chapter 558, RSMo, so that the judge shall assess punishment and not a jury for an offense other than murder in the first degree, that offense may be tried and submitted to the trier together with any murder in the first degree charged with which it is lawfully joined. In such case the judge will assess punishment on any offense joined with a murder in the first degree charge according to law and, when the trier is a jury, it shall be instructed upon punishment on the charge of murder in the first degree in accordance with Section 565.030.

4. When the State waives the death penalty for a murder first degree offense, that offense may be tried and submitted to the trier together with any other charge with which it is lawfully joined.

Section 571.015 R.S.Mo. (1986) Armed Criminal Action, defined, penalty.

1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of

the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the Department of Corrections and Human Resources for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

Section 565.020 R.S.Mo. (1986) First degree murder, penalty.

1. A person commits the crime of murder in the first degree if he knowingly causes the death of another person after deliberation upon the matter.

2. Murder in the first degree is a class A felony, except that the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor.

Section 565.024 R.S.Mo. (1986) Involuntary manslaughter, penalty.

1. A person commits the crime of involuntary manslaughter if he:

(1) Recklessly causes the death of another person;
or

(2) While in an intoxicated condition operates a motor vehicle in this state and, when so operating, acts with criminal negligence to cause the death of any person.

2. Involuntary manslaughter is a class C felony.

STATEMENT OF THE CASE

On May 6, 1986, Julia Bulloch, Respondent's wife, was asphyxiated when two strips of cloth were placed in her mouth and retained by tape wrapped around her face and over her mouth. Her body was found in the burning garage of the couple's residence. Indicted on a charge of first degree murder in August of 1986 and, a month later, on a charge of second degree arson, Respondent was first tried for murder and the state elected to seek the death penalty.

At trial, Respondent contended his wife's death was an accident resulting from an episode of consensual sexual bondage, but admitted starting the fire. The jury found Respondent not guilty of first or second degree murder and returned a verdict of guilty on the lesser offense of involuntary manslaughter. Respondent was sentenced to a term of seven years imprisonment.

Following the homicide trial, Respondent was indicted on additional charges of armed criminal action and tampering with physical evidence. The armed criminal action indictment charged that respondent recklessly caused the death of Julia Bulloch by asphyxiation and committed the felony of involuntary manslaughter "by, with, or through the use, assistance or aid of a dangerous instrument."¹ (Pet.App. E).

Prior to trial, Respondent filed a motion to prohibit the State from further prosecution. The circuit court denied the motion. Subsequently, Respondent filed a Petition for writ of prohibition before the Missouri Court of Appeals, Eastern District. He

¹ The state does not contend that additional facts necessary to sustain the armed criminal action charge had not occurred or were not discovered despite the exercise of due diligence at the time of the murder trial. Indeed, it appears that the state was fully aware of the facts alleged in the armed criminal action indictment when it proceeded to prosecute relator for first degree murder.

sought prohibition from proceeding on both the armed criminal action charge and the tampering with physical evidence charge as being violative of the double jeopardy clause. The Court of Appeals issued the writ, but only on the armed criminal action charge.

Trial proceeded on the charges of arson second degree and tampering with physical evidence, resulting in convictions on both charges. Respondent was sentenced to six and five years' imprisonment, respectively.

The Missouri Court of Appeals, Eastern District, made the preliminary writ permanent. The State requested and was granted transfer to the Missouri Supreme Court on the issue of violation of the Double Jeopardy clause of the Fifth Amendment of the Constitution of the United States.

The Supreme Court of Missouri centered its decision on *Missouri v. Hunter*, 459 U.S. 359, 74 L.Ed.2d 535, 103 S.Ct. 673 (1983) which allowed for cumulative punishment in a single proceeding. The Missouri Court found that *Hunter* did not reach cases of successive prosecution; therefore, the subsequent prosecution on the armed criminal action charge would violate the protection against successive prosecution. Consequently, the court denied the State's petition for rehearing.

ARGUMENT

The Missouri Supreme Court properly prohibited the successive prosecution of Respondent on the armed criminal action charge, as violative of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, and this case raises no dispositive issue of general importance. Thus, no further review is warranted.

The Double Jeopardy Clause, applicable to the States through the Fourteenth Amendment, is a guarantee that

the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. . . . *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), citing *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).

The constitutional guarantee is expressed as a prohibition against further prosecutions for the "same offense" after conviction. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Where successive prosecutions are at stake, the guarantee also serves "a constitutional policy of finality for the defendant's benefit." *United States v. Jorn*, 400 U.S. 470, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971). The policy of finality protects the accused from the prosecution's attempts to secure additional punishment after a prior conviction and sentence. *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

The Missouri Supreme Court, in *Bulloch*, followed the directives of the United States Supreme Court and the Fifth Amendment guarantee prohibiting Double Jeopardy, in relying on *Missouri v. Hunter*, 459 U.S. 359, 368, 103 S.Ct. 673, 679, 74 L.Ed.2d 535 (1983). In *Hunter*, the United States Supreme

Court held that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes prescribed the same conduct under the *Blockburger* test, the prosecutor may seek and the court or jury may impose cumulative punishment under such statutes in a single trial. *Id.* at 366. The requirement of a single trial was repeatedly noted by the *Hunter* court. By applying the holding in *Hunter*, the court found that because Bulloch was not tried for both charges in a single trial, to prosecute further would violate Respondent's Fifth Amendment guarantee prohibiting Double Jeopardy.

Petitioner argues that the Missouri Legislature provided for successive prosecution in the joinder provisions of Section 565.004.1 and .4 R.S.Mo. (1986). Section 565.004.1 R.S.Mo. allows the State to join and try in a single trial the offenses which arise out of the same transaction or constitute part of a common scheme or plan. Except as provided in subsections 2, 3, and 4 of this section, no first degree murder offense may be tried together with any offense other than first degree murder. Section 565.004.4 R.S.Mo. allows the State, when it waives the death penalty, to join and try in a single trial, a first degree murder charge with the companion charges.

The plain meaning of the Missouri joinder statute clearly is to prohibit the joinder of first degree murder with any other offense when the death penalty is sought by the state, unless the defendant is a prior offender.² The statute provision does not, as the Petitioner argues, provide for successive prosecution to obtain cumulative punishment when the State seeks the death penalty. The section offers prosecutors a choice. The prosecutor may elect to seek the death penalty, and thereby proceed on only the murder charge; or he could opt to forego the death

² If the defendant is a prior offender, then the state may try any offense lawfully joined with the first degree murder charge even when it elects to seek the death penalty. 565.004.3 R.S.Mo. (1986)

penalty and proceed to join other “same” charges with the murder charge. The statute does not provide any other alternatives or exceptions to these alternatives.

The State cites three cases in which this Court has recognized exceptions to the prohibition against successive prosecutions. The cases cited clearly have no relationship or similarity to *Bulloch*. The State’s “general rule” — no prohibition against second prosecution when the second prosecution arises through no fault of the State — simply does not apply to the *Bulloch* fact situation. In *Bulloch*, the State brought the charge that would cause the successive prosecution after an acquittal on first and second degree murder and a conviction on the charge of involuntary manslaughter. This factual deviation flies directly against the exception established in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977).

In *Jeffers*, the Court again recognized an exception “when all the events necessary to the greater crime have not taken place at the time the prosecution for the lesser is begun.” *Id.* at 151. This is hardly the situation in Respondent’s case. Referring to *Jeffers*, the Missouri Supreme Court specifically noted that

the state does not contend that additional facts necessary to sustain the armed criminal action charge had not occurred or were not discovered despite the exercise of due diligence at the time of the murder trial. Indeed, it appears that the state was fully aware of the facts alleged in the armed criminal action indictment when it proceeded to prosecute [Respondent] for first degree murder. [Pet.App. A].

Further, the government in *Jeffers* sought consolidation of separate charges in one proceeding. After successfully opposing the consolidation, the defendant objected to the second trial. Clearly in *Jeffers*, the defendant’s successful objections were partially the cause for having the second trial. *Bulloch*, however, did not take any type of action to deter the State from

proceeding on both charges. In fact, he could not take any action: at the time of the murder trial, the defendant had no charge of armed criminal action pending against him.

The State refers to several other cases to justify its quest for successive prosecution. *Price v. Georgia*, 318 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970); *United States v. Dinetz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). *Price* and *Dinetz* recognize that the prosecution may continue to prosecute a defendant after his successful appeal or motion for mistrial, respectively. And yet, unlike the situation at hand, the prosecution, in accordance with *Price* and *Dinetz*, can only seek to retry the defendant on the identical charge, not on "same" *Blockburger* offenses.

Further, collateral estoppel bars the State from prosecuting Respondent on the armed criminal action charge. Collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In *Bulloch's* initial trial, the jury by its verdict of involuntary manslaughter, found that the Respondent acted "recklessly" in using the tape and the gag. When it acquitted Respondent of murder in the first and second degree, the jury specifically declined to find that Respondent acted with the purpose of causing death or serious injury. The armed criminal action statute clearly was not intended to cover a "reckless" situation of this kind. As Justice Blackmar noted in his concurring opinion, the instruments charged in *Bulloch's* indictment — the tape and cloth — are "inherently dangerous" only if used with the purpose of causing death or bodily harm. In *Bulloch*, "the first jury foreclosed a finding of any such purpose." *State ex rel. Dennis Bulloch v. Honorable A. J. Seier*, 771 S.W.2d 71 (Mo.banc 1989). (Pet.App. A). Consequently, successive prosecution of Respondent on the charge of armed criminal action constitutes a violation of his collateral estoppel/double jeopardy rights as guaranteed by the Fifth Amendment of the United States Constitution.

The Missouri Supreme Court clearly upheld Respondent's constitutional right to be free from being twice put in jeopardy for the same offense. The Double Jeopardy Clause is not a "fragile guarantee." It is a guarantee which prohibits the State from the successive prosecution of Respondent on the "same offense" within the meaning of *Blockburger* — the charge of armed criminal action. The State argues that "through no fault of its own" it was unable to proceed in a single trial on both charges. In reality, the State's "fault" was making a decision, which in hindsight, it now regrets. By seeking the death penalty, the State made a choice to try only the first degree murder charge in the first trial. Further, the State did not contemplate a possible joinder, for Respondent was not charged with armed criminal action until after his conviction of involuntary manslaughter. Collateral estoppel, further, bars the State from proceeding on the armed criminal action charge. Due to the prior jury's findings of fact, the State may not now relitigate the issue of Respondent's state-of-mind in a successive prosecution. This case, therefore, presents no issue warranting further review.

CONCLUSION

The petition for writ of certiorari should be denied, or in the alternative, the holding of the Missouri Supreme Court should be affirmed.

Respectfully submitted,

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